

U.S. Department of Justice



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February 11, 2008

BY HAND

Honorable Denny Chin
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: United States v. Delvis Vargas
08 Civ. 97 (DC)
02 Cr. 1388 (HB)

Dear Judge Chin:

The Government respectfully submits this letter in response to the pro se motion by Delvis Vargas, filed on January 7, 2008, for return of property seized from him by the Federal Bureau of Investigation. Pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, Vargas seeks the return of (1) personal property including a Casio watch, an earring, and other miscellaneous items seized from him on October 2, 2002, the date of his arrest; and (2) \$3,400 seized from a van he was driving with co-defendant Luis Morant-Cordero when the FBI stopped the van, on September 18, 2002. See Vargas Motion for Return of Personal Property and For Injunctive Relief, at 2. The Government has no objection to the return of the personal items seized from him at the time of his arrest. With respect to the \$3,400 seized, however, the Government respectfully submits that Vargas is entitled to the return of \$1,400 and his co-defendant Morant-Cordero is entitled to the return of the remaining \$2,000.

1. Background

Delvis Vargas, a/k/a "Pedro Carvajal," and two co-defendants were charged in Indictment 02 Cr. 1388 (HB) on October 24, 2002

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(the "Indictment"). Count One of the Indictment charged Vargas, Domingo Gaton, a/k/a "Antonio Carro," and Luis Morant-Cordero, a/k/a "Luis Moran Cordero," with conspiring to distribute and possess with intent to distribute 50 grams and more of crack cocaine, in violation of Title 21, United States Code, Section 846.

The trial of Vargas began on March 3, 2003. On March 6, 2003, the jury convicted Vargas of Count One of the Indictment. On August 7, 2003, the Honorable Harold Baer, Jr., sentenced Vargas to a term of 121 months' imprisonment, to be followed by a five-year term of supervised release, and a mandatory \$100 special assessment.¹ Vargas's conviction and sentence were affirmed by the Second Circuit Court of Appeals in United States v. Gaton, 03-1422 (L), 03-1489 (CON), 2004 U.S. App. LEXIS 10238 (2d Cir. May 25, 2004).

2. Applicable Law

Rule 41(g) "provides a method for return of seized property and suppression of evidence in a criminal case." Onwubiku v. United States, 969 F.2d 1392, 1396 (2d Cir. 1992). Once the criminal proceedings have concluded, Rule 41(g) has no further application. Id. at 1396-97 ("[a]fter the case is concluded, a property owner may have other rights under statutory or common law for return of property wrongfully seized, but he has no such right under [Rule 41(g)] after conviction") (collecting cases). Nonetheless, with respect to motions filed by pro se litigants, the Second Circuit Court of Appeals has made clear that "[w]here

¹ On December 22, 2004, Morant-Cordero pleaded guilty to Count One of the Indictment. On May 19, 2005, Judge Baer sentenced Morant-Cordero to a term of 120 months' imprisonment, to be followed by a five-year term of supervised release, and a mandatory \$100 special assessment.

On February 25, 2002, Gaton pleaded guilty to Counts One and Two of the Indictment. On June 26, 2003, Judge Baer sentenced Gaton to concurrent terms of 120 months' imprisonment on Counts One and Two, to be followed by a five-year term of supervised release, and a mandatory \$200 special assessment.

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criminal proceedings against the movant have already been completed, a district court should treat a rule 41(e) motion as a civil complaint." Onwubiku v. United States, 969 F.2d at 1397; see also Mora v. United States, 955 F.2d 156, 158 (2d Cir. 1992) ("where no criminal proceedings against the movant are pending or have transpired, a motion for the return of property is 'treated as [a] civil equitable proceeding[] even if styled as being pursuant to Fed. R. Crim. P. 41(e)'") (quoting United States v. Martinson, 809 F.2d 1364, 1367 (9th Cir. 1987)).

3. Argument

a. Summary

Vargas claims that he is entitled to \$3,400 seized from the van in which he and co-defendant Morant-Cordero were riding on September 18, 2002, when the van was stopped and searched by the FBI. After a review of the trial testimony and statements made to law enforcement by each defendant, the Government submits that Vargas entitled to the return of \$1,400 and his co-defendant Morant-Cordero is entitled to the return of the remaining \$2,000.

As discussed in detail below, testimony at trial established that there was a total of \$5,400 recovered from the van that Vargas and Morant-Cordero were riding in on September 18, 2002. Of the \$5,400, \$1,000 was recovered from Vargas's pants pocket, \$2,880 was recovered from the glove compartment of the van, and \$1,520 was recovered from underneath the front passenger seat where Morant-Cordero was seated. Of this \$5,400, \$2,000 was the Federal Bureau of Investigations's pre-recorded "buy" money used by the confidential informant, working at the direction of the FBI, in the narcotics transaction for which the defendants were convicted. Therefore, \$3,400 remains to be returned to the defendants.

The Government's proof established that, on September 18, 2002, Domingo Gaton, Delvis Vargas and Luis Morant-Cordero sold 68 grams of crack cocaine to a confidential informant ("CI") working with the Federal Bureau of Investigation ("FBI"). This drug deal took place outside La Caridad Restaurant in Washington Heights and was surveilled and taped by FBI agents and New York City Police Department ("NYPD") detectives who were members of an FBI narcotics task force. Gaton negotiated the crack sale with the CI and gave the crack to the CI in front of the restaurant. Morant-Cordero supplied the crack. Vargas, together with Morant-

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Cordero, delivered the crack to Gaton and received \$2,000 in proceeds from the sale. The evidence at trial amply demonstrated that Vargas knowingly participated in the conspiracy to sell crack cocaine to the CI on September 18, 2002. The evidence showed that while Gaton and the CI met in front of La Caridad Restaurant, Vargas and Morant-Cordero arrived in a white van driven by Vargas to deliver the crack cocaine. The 68 grams of crack were stored inside a loaf of bread that was on the floor in between the front seats of the van. Once Vargas arrived at La Caridad, he parked the van in front of the restaurant. Gaton obtained the crack from the van and then gave it to the CI in exchange for \$2,000 in pre-recorded buy money. The van that Vargas was driving was followed and later stopped. A search of the van discovered the entire \$2,000 of pre-recorded buy money inside the van.

After the \$5,400 – including the \$2,000 of the FBI's pre-recorded "buy" money – was seized, Vargas made several attempts to get the money back from law enforcement officers over the next few weeks. In doing so, Vargas made very different statements to law enforcement about the source and the amount of money seized. In all of Vargas's statements, he claimed – falsely – that the FBI's pre-recorded "buy" money was money that Vargas possessed prior to the drug delivery.

b. Trial Testimony

In August and September 2002, Gaton told the confidential informant, who was working with the FBI, that he could sell crack cocaine to the CI. (Tr. 27).² A meeting was scheduled between Gaton and the CI, at which the CI was going to purchase crack cocaine from Gaton. (Tr. 29). Law enforcement agents surveilled and monitored the meeting, which took place on September 18, 2002, in front of La Caridad Restaurant on Amsterdam Avenue near 164th Street. (See Tr. 32-36, 75-85). The meeting was audiotaped by the CI, who wore a body wire (Tr. 33; GX 8, 8-R, 8-TR-R), and was also videotaped by the law enforcement officers. (Tr. 76, 80-85; GX 7).

The drug deal took place between approximately 6:16 p.m. and

² "Tr." refers to the transcript of the trial in the underlying criminal case, 02 Cr. 1388 (HB); "GX" refers to exhibits introduced by the Government at trial in that case.

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6:48 p.m. (GX 8, GX 8-TR). At approximately 6:00 p.m., before the deal, Special Agent Jason Demartino of the FBI gave the CI \$2,000 of pre-recorded U.S. currency to use to purchase the crack cocaine from Gaton. Demartino had xeroxed each of the bills and initialed and dated the copies prior to giving the money to the CI. (Tr. 31). After that, the CI went to La Caridad Restaurant, and met with Gaton. (Tr. 76). Gaton told the CI during the meeting that the crack he sells is "great stuff" (GX 8-R-TR at 2), and that "these people that cook it for me . . . don't add cut to it." (GX 8-R-TR at 3).

As Gaton and the CI were waiting in front of the restaurant for the delivery of the crack, Gaton told the CI, "Let me call these people there." (GX 8-R-TR at 7). While on the phone, Gaton said, "Which way are you guys coming?" (GX 8-R-TR at 7). After this call concluded, Gaton told the CI several times that he only does business with people he knows and trusts. Gaton said, "I have my people, you know, I'm comfortable, relaxed." (GX 8-R-TR at 7). Later, Gaton told the CI again, "I do business with very few people but when I do, I do it well, because what people always do is deceive one another." (GX 8-R-TR at 8). Gaton then received a call from Morant-Cordero. Gaton said, "I've been outside here, at El Caridad." (GX 8-R-TR at 8). After that conversation, Gaton told the CI, "he's a serious guy, . . . I like doing business with him." (GX 8-R-TR at 9). Later, Gaton advised the CI, "don't do business with strange people." (GX 8-R-TR at 10).

Gaton made several telephone calls from his cell phone while standing in front of the restaurant. (GX 7; Tr. 77). Between 6:14 p.m. and 6:35 p.m. alone, which included the time that Gaton was meeting with the CI at La Caridad, Gaton and Morant-Cordero called each other approximately seven times. (GX 32). Morant-Cordero and Vargas called each other approximately eleven times on September 18, 2002. (GX 32).³ The last call between Morant-Cordero and Vargas was at 5:52 p.m., indicating that the two men were together in the van at the time Gaton was speaking to Morant-Cordero from in front of La Caridad. (GX 32).

When Gaton and the CI were meeting, Vargas, accompanied by Morant-Cordero, arrived at La Caridad Restaurant in a white van.

³ Vargas's cell phone was subscribed in the name of Lydia Nunez. (Tr. 57; GX 6).

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Vargas double-parked the van on the street in front of the restaurant, directly in front of the location where Gaton and the CI were standing on the sidewalk. (Tr. 40, 77, 87; GX 7). The van's hazard lights were activated. (Tr. 77). Vargas was in the driver's seat and Morant-Cordero was in the passenger's seat. (Tr. 40, 87). The hollowed-out loaf of bread containing the crack cocaine was on the floor in between Vargas and Morant-Cordero. (Tr. 41; GX 15A, GX 15B, GX 15C).

Soon after Vargas and Morant-Cordero arrived, Gaton entered the van. New York City Police Detective Isaías Colon, assigned to the FBI Task Force, was monitoring the meeting from a car that was parked across the street from La Caridad. Detective Colon, who was equipped with binoculars (Tr. 76), could see inside the van through the front windshield window. (Tr. 80). When Gaton was inside the van, Detective Colon, using his binoculars, observed the driver and the passenger reaching down into the center area between the two front seats, and saw the driver's arms reaching into that center area. (Tr. 77-78, 84, 108-09). This is the location where the hollowed-out loaf of bread was later found. (Tr. 41, 140).

A short time later, Gaton exited the van and re-joined the CI on the sidewalk in front of the restaurant. (GX 7). Gaton and the CI then went inside La Caridad. Once inside, Gaton gave the CI a brown paper bag containing approximately 68 grams of crack and the CI gave Gaton the \$2,000 of pre-recorded U.S. currency. (GX 4, GX 5, GX 7, GX 8, GX 8-TR-R at 11). Vargas and Morant-Cordero waited in the van in front of the restaurant. (GX 7).

After the drug deal was concluded, Gaton re-entered the van and Vargas drove away. (GX 7; Tr. 85-86). Gaton got out of the van a few minutes later in the vicinity of 165th Street. (Tr. 86). Vargas continued to drive northbound in upper Manhattan. (Tr. 38, 137). Deciding to stop the van, agents in the lead car in the surveillance put on their lights and sirens and attempted to pull over Vargas. (Tr. 38, 137). Vargas tried to elude the agents and drove through four or five traffic lights. Vargas finally stopped when the van got stuck in traffic in the vicinity of 186th Street. (Tr. 38, 138).

Vargas and Morant-Cordero were detained and taken to the 33rd Precinct, where they were searched and interviewed. (Tr. 39-40). A search of Vargas revealed \$1,000 in cash in one of his pockets. (Tr. 139). Agents searching the van found the hollowed-

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out loaf of bread on the floor in between the front seats and \$4,400 in cash. (Tr. 41, 140; GX 15A, GX 15B, GX 15C). Of the \$4,400, \$2,880 was found in the glove compartment and \$1,520 was found under the front passenger seat. (Tr. 41, 140). All \$2,000 of the FBI's pre-recorded "buy" money that had been used by the CI to purchase the crack was recovered from Vargas's van. (Tr. 44-45; GX 2).

That night, September 18, 2002, Vargas told the agents that all of the money in the van was his and that he had earned it from his job at a grocery store. (Tr. 122). Vargas also said that he did not know the names of the people who were in the van with him that night but that they were his friends. (Tr. 123). Moreover, on September 18, Vargas did not have any identification in his true name. (Tr. 53).

When agents separately interviewed Morant-Cordero that night, Morant-Cordero told them that \$2,000 of the money seized from the van was his. (Tr. 124-25).

Vargas and Morant-Cordero were released that night and the investigation continued. (Tr. 40-41). However, all \$5,400 found in the van and on Vargas was seized by the FBI. On September 18, 2002, Vargas was given a receipt, which he signed, for the \$5,400. (Tr. 88-89; GX 11).

Thereafter, in an effort to reclaim the \$5,400, Vargas made three additional statements to the NYPD regarding the source of the funds, all of which conflicted with one another and with the statement he made on the night of September 18, 2002, and all of which falsely represented, among other things, that Vargas had been in possession of the FBI's pre-recorded "buy" money prior to the drug deal.

First, during the early morning of September 19, 2002, Vargas contacted the Internal Affairs Bureau ("IAB") of the NYPD. Vargas told Sgt. Joseph Tetonic of the NYPD Internal Affairs Bureau that \$6,000 – not \$5,400 – was taken from him by officers during the stop. (Tr. 127-28). Vargas claimed that of the \$6,000 seized, \$5,000 belonged to him and \$1,000 was a loan from "Hamilton." He said that he did not know Hamilton's last name but knew him from a gym. (Tr. 128). Vargas claimed that he (Vargas) worked in a minimart near the corner of Academy and Vermilya in Washington Heights and that Hamilton also used to work there. (Tr. 128). This statement was false; although there are three

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grocery stores near the corner of Academy and Vermilya in Washington Heights, Vargas had not worked in any of them. (Tr. 191-92, 196, 200). During the meeting, Vargas gave Sgt. Tetonic a bank receipt dated in July that showed a \$5,000 withdrawal. Vargas also claimed that, although he was unemployed, he was going to use the money to buy a motorcycle. (Tr. 128-29).

Next, on September 24, 2002, Vargas went to the 33rd Precinct to meet with Detective Colon in an effort to claim the money seized from his van. (Tr. 90). At this meeting, Vargas yet again made different statements about the amount and the source of the money. Vargas gave Detective Colon a copy of a Citibank withdrawal slip from the account of a man named Jose Paulino, who Vargas said was his cousin. Vargas claimed that the withdrawal slip showed that the money found in the van belonged to Vargas. (GX 12; Tr. 90-91). The document showed a \$5,000 withdrawal on July 27, 2002 – two months earlier – from Paulino's account. (GX 12). Vargas told Detective Colon that he had saved the money from his job in a grocery store. (Tr. 91). On September 24, Vargas provided Detective Colon with a written statement in which he claimed that \$5,500 was taken from him on September 18 and that all of the money was his own. (GX 13, 13A; Tr. 92).

Finally, on October 2, 2002, Vargas went to the 33rd Precinct again in another effort to recover the money. (Tr. 46-50, 95-98). Vargas brought Morant-Cordero with him. Vargas and Morant-Cordero each met with Detective Colon and Special Agent Demartino. Vargas told them that he wanted to pick up the \$5,400 and that all of the money was his. This time, Vargas said that his friend Hamilton had given him \$2,000 of the \$5,400 and the rest represented Vargas's earnings from his job. (Tr. 47-48, 96-97).

The agents separately interviewed Morant-Cordero on October 2, 2002. Morant-Cordero told them that Vargas called him on September 18 and asked to borrow \$2,000. Morant-Cordero agreed to loan it to him. (Tr. 97). Morant-Cordero said that Vargas picked him up on September 18 at 2:00 p.m., and as soon as Morant-Cordero got into Vargas's van, Morant-Cordero put the \$2,000 into the glove compartment. (Tr. 97-98). Morant-Cordero said that the \$2,000 he loaned to Vargas represented Morant-Cordero's own earnings from his job at a grocery store. (Tr. 98).

Vargas and Morant-Cordero were arrested at the 33rd Precinct on October 2, 2002. (Tr. 50). That same day, Gaton was also

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arrested. (Tr. 53).

Vargas called no witnesses at trial, and the only evidence he presented was a stipulation between the parties that the owner of the drugs was Morant-Cordero. (Tr. 146).

c. Discussion

By letter dated August 28, 2007, the FBI notified Vargas and Morant-Cordero about the property seized in connection with the case and gave them each 30 days to claim the property. With respect to the \$3,400 recovered from the van in which both defendants were driving on September 18, 2002, each defendant claimed that the entire amount of money belonged to him.

The FBI then sent Vargas and Morant-Cordero letters dated November 29, 2007, stating that on the basis of the evidence, \$1,400 should be returned to Vargas, and \$2,000 should be returned to Morant-Cordero. (See Letters from Supervisory Special Agent Jason Demartino, dated November 29, 2007, attached as Exhibit A). Morant-Cordero agreed to accept \$2,000 (see Morant-Cordero Letter and Indemnity Agreement, dated December 4, 2007, attached as Exhibit B). However, Vargas continues to claim that the entire \$3,400 belongs to him.

On the basis of the evidence elicited at trial, the Government respectfully submits that Vargas is entitled to \$1,400, and Morant-Cordero is entitled to \$2,000, of the \$3,400 seized from the van. As set forth above, of the \$5,400, \$1,000 was recovered from one of Vargas's pants pockets, (Tr. 139), \$2,880 was found in the glove compartment and \$1,520 was found under the front passenger seat. (Tr. 41, 140). (However, \$2,000 of this cash was the FBI's pre-recorded "buy" money that had been used by the CI to purchase the crack from Vargas and Morant-Cordero. (Tr. 44-45; GX 2)).

On the night of the seizure of the cash, Vargas, using the fake name "Pedro Carvajal," told the agents that all of the money in the van was his. (Tr. 122), whereas Morant-Cordero told them that only \$2,000 of the money seized from the van was his. (Tr. 124-25).

After the money was seized, Vargas made three additional statements to the NYPD regarding the cash, all of which conflicted with one another and with the statement he made on the

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night of September 18, 2002. See pp. 7-8 above. Furthermore, Vargas continued to use a fake name and to falsely claim on several occasions that the FBI's pre-recorded "buy" money was also his and that he had possession of the "buy" money prior to the drug deal - assertions which were plainly lies. *Id.* Morant-Cordero, however, consistently told law enforcement agents - on the night the cash was seized and at the time of his arrest - that \$2,000 of the \$5,400 seized from the van was his. (See Tr. 124-25; Tr. 97-98). Cordero's statements about the cash are corroborated by Vargas's own statements to law enforcement (made on October 2, 2002), when he told agents that Morant-Cordero had given him \$2,000 on the same day that the cash was seized. (Tr. 47-48, 96-97).

Therefore, the Government respectfully submits that the evidence at trial shows that Vargas is entitled to the return of \$1,400 and his co-defendant Morant-Cordero is entitled to the return of the remaining \$2,000.

With respect to Vargas's personal property listed in the FBI voucher dated October 2, 2002 and signed Vargas using the name "Pedro Carvajal," (attached as Exhibit C), the FBI will release this property by making it available for pickup by a person designated by the defendant.

Very truly yours,

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By: _____
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